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No. 5823

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

METROPOLITAN CASUALTY INSURANCE COMPANY OF NEW YORK (a corporation), *Appellant,*	
vs.	
MURIEL E. COLTHURST, *Appellee.*	

BRIEF FOR APPELLANT.

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FILED
OCT 25 1929
PAUL P. O'BRIEN,
CLERK

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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Appellant,

vs.

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BRIEF FOR APPELLANT.

PRELIMINARY STATEMENT.

This is an appeal by Metropolitan Casualty Insurance Company of New York from a judgment of the United States District Court for the Northern District of California, Southern Division, in an action brought against it by appellee Muriel E. Colthurst upon an automobile liability insurance policy issued by appellant to one John Harris.

The action was one brought by appellee upon a judgment which appellee had procured against Harris, the assured, for personal injuries alleged to have been sustained by appellee by reason of the operation by Harris of the automobile covered by the insurance policy issued by appellant. Judgment was ren-

dered by the court below on April 1, 1929, in favor of appellee and against appellant in the sum of $5,663.06, together with costs, taxed at $28.00. The case was tried before the Honorable Frank H. Kerrigan, Judge of the court below, sitting without a jury, a jury trial having been waived by written stipulation of the parties. The case was tried and submitted to the court below upon an agreed statement of facts.

ASSIGNMENT OF ERRORS.

By its assignment of errors on file herein appellant sets out five specifications of error. There is but one point, however, which is raised by appellant upon this appeal, and it is this: That John Harris, the assured in the policy of insurance issued by appellant, breached and failed to perform a material condition of the policy of insurance issued to him, thus defeating any rights which he might have had under the policy and that the rights, under said policy, of appellee Muriel E. Colthurst, the injured person, are no greater than the rights of the assured.

This point is sufficiently raised by two of the assignments of error on file herein. These assignments are the ones upon which appellant will rely upon this appeal. They are as follows:

"I.

That the judgment in said action is not supported or sustained by the facts in said case as agreed upon between the parties in said action, in this, to wit: That it definitely appears from

said agreed facts that John Harris, the assured in the policy of insurance sued on herein, breached and failed to perform a material condition of said policy, thus rendering said policy void as to him and defeating all of his rights under said policy, and that the rights of plaintiff herein under said policy are no greater than those of said assured; that said failure of performance and said breach by said John Harris of a material condition of said policy consisted in this, to wit: That said John Harris failed to forward according to the terms of said policy to said Metropolitan Casualty Insurance Company of New York, defendant herein, the summons served upon him in the action brought by plaintiff above named against him for damages for personal injuries arising out of the use, maintenance and operation of the automobile of said John Harris, and that said John Harris failed according to the terms of said policy to notify said Metropolitan Casualty Insurance Company of New York of said service upon him of said summons.

II.

That the judgment in said action is not supported or sustained by the agreed facts in said case in this, to wit: That it definitely appears from said agreed facts that Metropolitan Casualty Insurance Company of New York, defendant herein, did not receive until the 12th day of May, 1927, the summons, or any copy thereof, served upon John Harris, the assured in the policy of insurance sued on herein, in the action brought against him by plaintiff herein in the county of Napa, State of California, and that said Metropolitan Casualty Insurance Company of New York, defendant herein, did not receive until said 12th day of May, 1927, any notice of the service upon said John Harris of said summons."

THE FACTS.

All of the facts in the case, which facts were agreed upon at the trial, are contained in the bill of exceptions. These facts may be stated in substance as follows:

On May 1, 1926, appellant issued to John Harris in the State of California a policy of automobile indemnity insurance by which appellant agreed to indemnify Harris against any liability not exceeding the sum of $5000 with taxed court costs and interest which should arise against him in favor of any person who should sustain any bodily injuries by an accident by reason of the ownership, maintenance or use by Harris of a certain automobile then owned by Harris and referred to in the policy. This policy of insurance was in full force and effect on the 15th day of June, 1926.

On December 3, 1926, an action was commenced by Muriel E. Colthurst, appellee herein, against Harris in the Superior Court of the State of California in and for the County of Solano for damages for personal bodily injuries alleged by her to have been sustained by her while she was riding in Harris' said automobile on the 15th day of June, 1926, at the request and invitation of Harris, said automobile then being operated and controlled by Harris. Harry I. Stafford, Esq. acted as attorney for appellee in said action. Summons in said action was served on Harris about the middle of December, 1926, which summons was forwarded by Harris to appellant. Appellant thereafter engaged the services of Joseph

Raines, Esq., an attorney at law of Fairfield, Solano County, California, to conduct the defense of Harris in said action and to act as the agent of appellant in said action. Attorney Raines appeared in that action on behalf of Harris by filing a demurrer to the complaint therein. That action was thereafter dismissed by the plaintiff. Thereafter and on or about January 10, 1927, attorney Raines received the following letter from Mr. Stafford, attorney for the plaintiff in the action:

> "Mr. Joseph M. Raines Jan. 10, 1927
> Attorney at Law
> Fairfield, California
> Dear Sir:
>
> I received a copy of your demurrer in the matter of Colthurst v. Harris.
>
> Subsequent to the commencement of the action in Solano County, I commenced an action in Napa County where the accident occurred and accordingly I have dismissed the Solano action and enclose you a copy of the same.
>
> Very truly yours,
> Harry I. Stafford."

The enclosure mentioned in the above letter was a copy of the dismissal of the Solano County action.

Following the dismissal of the Solano County action and on December 21, 1926, said Muriel E. Colthurst, appellee herein, commenced a new action in the Superior Court of Napa County, California, against Harris for damages for the personal injuries above mentioned. The new action thus commenced by Miss Colthurst embodied the same cause of action set forth by her in her Solano County action which had been dismissed. On December 30, 1926, Harris

was personally served in San Diego County, California, with complaint and summons in the new action, that is, the Napa County action. Harris failed to file an appearance in the Napa County action within the time provided by law and on February 3, 1927, his default was duly taken and entered therein; and on May 9, 1927, judgment was rendered against him in said action and in favor of plaintiff therein, Muriel E. Colthurst, in the sum of $10,000, together with costs in the sum of $7. That judgment has become final, and is now wholly unsatisfied and unpaid.

The assured, John Harris, failed and neglected until May 12, 1927, that is, until after judgment had been rendered against him in said action, to forward or turn over to appellant herein the complaint or summons which had been served upon him in said action, or to notify appellant of the service upon him of complaint or summons. Neither appellant, nor any of its agents or representatives, nor Attorney Raines, ever received until May 12, 1927, any copy of the complaint or summons thus served on Harris or any notice of the service upon him of said complaint or summons.

By the terms of the policy of insurance, issued by the appellant to Harris, it is provided that the insurance and the policy are subject to certain conditions stated in the policy, one of the conditions being as follows:

> "Written notice of any accident with the most complete information obtainable at the time must be forwarded to the Home Office of the Com-

> pany, or to an authorized representative as soon as is reasonably possible. Notice given by or on behalf of the Assured to any authorized agent of the Company with particulars sufficient to identify the Assured shall be deemed to be notice to the Company, and failure to give any notice hereinbefore required shall not invalidate any claim made by the Assured, unless it shall be shown not to have been reasonably possible to give such notice within prescribed time, and that notice thereof, *and if suits are brought to enforce such a claim, the Assured shall immediately forward to the Company every summons, or other process as soon as same shall have been served on him."* (Italics ours.)

On May 12, 1927, appellant herein notified Harris in writing that he had committed a breach of one of the essential conditions of the policy, that is, that he had failed to forward to appellant the complaint or summons served upon him in the Napa County action in compliance with the provisions of the policy, and that therefore he had forfeited his rights under the policy; and by its notice appellant disclaimed and ever since has continuously disclaimed all liability under the policy.

Following the judgment taken against Harris in said action, Harris on his own account and entirely at his own expense engaged the services of Attorney Joseph Raines for the purpose of setting aside the default and judgment entered against him and for the purpose of acting as his attorney in said action. Acting through attorney Raines, Harris made a timely motion to set aside the default and judgment. On September 12, 1927, the motion was denied for the

reason that it had not been brought to the attention of the court within a period of six months from the date of judgment therein. Appellant herein never participated in said action at any time or in any way and the employment of Attorney Raines by Harris in said action was made and done solely by Harris on his own behalf and was not made, done or participated in by appellant.

As a part of said agreed statement of facts two exhibits were received in evidence by the court at the time of the trial. These exhibits were as follows:

> The judgment roll in the action brought by appellee herein against Harris in the Superior Court of Napa County, California, said judgment roll being marked Plaintiff's Exhibit 1.
>
> The policy of insurance issued by appellant to Harris; said policy being marked Plaintiff's Exhibit No. 2.

These exhibits were not included in the bill of exceptions, but the originals thereof have been transmitted to this court by an order of the court below. The matters contained in the judgment roll of the Napa County action (Plaintiff's Exhibit 1) are set forth in the above statement of facts and therefore the exhibit is not printed in the transcript of record herein. The insurance policy (Plaintiff's Exhibit 2) appears in the printed transcript of record herein, pages 42 et seq.

An Act of the Legislature of the State of California approved May 21, 1919, and found at Statutes of California of 1919, page 776, was introduced in evidence upon the trial herein as a part of the agreed

statement of facts and deemed read; this Act provides as follows (omitting inapplicable portions):

> "*Action against insurance carrier when insured is insolvent. Exhibit of policy.* No policy of insurance against loss or damage resulting from accident to, or injury suffered by another person and for which the person injured is liable other than a policy of insurance under the workmen's compensation, insurance and safety act of 1917 or any subsequent act on the same subject, or against loss or damage to property caused by horses or other draught animals or any vehicle, and for which loss or damage the person insured is liable, shall be issued or delivered to any person in this state by any domestic or foreign insurance company, authorized to do business in this state, *unless there shall be contained within such policy a provision that the insolvency or bankruptcy of the person insured shall not release the insurance carrier from the payment of damages for injury sustained or loss occasioned during the life of such policy and stating that in case judgment shall be secured against the insured in an action brought by the injured person* * * * *then an action may be brought against the company, on the policy and subject to its terms and limitations, by such injured person* * * * *to recover on said judgment.*" (Italics ours.)

The provision in the policy of appellant with regard to the injured person's right of action varied somewhat from the requirements of the California statute above quoted. The law is, however, that the provisions of the statute are deemed a part of the policy in the same manner as if they were exactly reproduced in the policy; hence the variance is immaterial.

Upon the above agreed statement of facts, the trial court rendered judgment in favor of plaintiff Muriel E. Colthurst (appellee herein) and against defendant Metropolitan Casualty Insurance Company of New York (appellant herein) in the sum of $5000 together with interest thereon at the rate of 7% from May 9, 1927, and costs of suit, which judgment was entered by the Clerk of the Court below on April 1, 1929. Thereafter appellant filed a written exception to said judgment, which exception was allowed by the court below. The exception and order allowing the same appear at pages 14 and 15 of the transcript of record.

ARGUMENT.

The specifications of error relied upon by appellant are two. They are as follows:

"I.

> *That the judgment in said action is not supported or sustained by the facts in said case as agreed upon between the parties in said action, in this, to wit: That it definitely appears from said agreed facts that John Harris, the assured in the policy of insurance sued on herein, breached and failed to perform a material condition of said policy, thus rendering said policy void as to him and defeating all of his rights under said policy, and that the rights of plaintiff herein under said policy are no greater than those of said assured; that said failure of performance and said breach by said John Harris of a material condition of said policy consisted in this, to wit: That said John Harris failed to forward according to the terms of said policy to said Metropolitan Casualty Insurance Com-*

pany of New York, defendant herein, the summons served upon him in the action brought by plaintiff above named against him for damages for personal injuries arising out of the use, maintenance and operation of the automobile of said John Harris, and that said John Harris failed according to the terms of said policy to notify said Metropolitan Casualty Insurance Company of New York of said service upon him of said summons.

II.

That the judgment in said action is not supported or sustained by the agreed facts in said case in this, to wit: That it definitely appears from said agreed facts that Metropolitan Casualty Insurance Company of New York, defendant herein, did not receive until the 12th day of May, 1927, the summons, or any copy thereof, served upon John Harris, the assured in the policy of insurance sued on herein, in the action brought against him by plaintiff herein in the county of Napa, State of California, and that said Metropolitan Casualty Insurance Company of New York, defendant herein, did not receive until said 12th day of May, 1927, any notice of the service upon said John Harris of said summons."

As revealed by the above specifications of error, there is but one point involved in this appeal, which may be briefly stated thus:

Harris, the assured, had no rights under the policy because he breached a material condition of the policy in failing until after judgment had been taken against him, to forward to appellant the summons served upon him in the Napa County action. (Error No. 2 above set forth is merely cumulative in that it sets out that in addition to Harris's failure to notify appellant of the service of summons upon him, appellant re-

ceived no notice thereof from any other source.) The question is therefore whether Miss Colthurst, the injured person, has any rights under the policy greater than those of Harris, the assured. We submit that she has not; that she stands in the shoes of the assured and that therefore she has no greater rights against the appellant than the assured would have. As a consequence, it is appellant's contention that the judgment of the court below was not sustained by the facts of the case and our argument will be limited to that point.

Appellant's contentions may be divided into the following three propositions:

I.

The provision in the policy requiring immediate forwarding to appellant of summons and other process as soon as served on the assured is a vital provision, compliance with which is essential to the rights of the assured under the policy.

II.

The letter from appellee's attorney to Attorney Raines did not operate to fulfill the terms of the policy with regard to the forwarding of the summons and process.

III.

In view of the law and of the provisions of the policy, the rights of the appellee are no greater than those of the assured, and the failure of the assured to notify appellant of the service of process upon him precludes any liability under the policy in favor of either the assured or appellee.

These three propositions will be taken up in the order above stated.

I.

THE PROVISION IN THE POLICY REQUIRING IMMEDIATE FORWARDING TO APPELLANT OF SUMMONS AND OTHER PROCESS AS SOON AS SERVED ON THE ASSURED IS A VITAL PROVISION, COMPLIANCE WITH WHICH IS ESSENTIAL TO THE RIGHTS OF THE ASSURED UNDER THE POLICY.

Ann. Cas. 1914-B 412, Note;

Travelers Ins. Co. v. Meyers & Co., 62 Ohio St. 529, 57 N. E. 458;

U. S. Casualty Co. v. Breese (Ohio), 153 N. E. 206;

National Co. v. U. S. Fidelity etc. Co., 94 N. Y. S. 457;

National etc. Co. v. Travelers Ins. Co. (Mass.), 57 N. E. 350;

London etc. Co. v. Siwy (Ind.), 66 N. E. 481;

Riddlesbarger v. Ins. Co., 7 Wall. 390;

Underwood etc. Co. v. London etc. Co. (Wis.), 75 N. W. 996.

This principle is thoroughly established by the authorities above cited and inasmuch as the principle was undisputed by appellee in the briefs filed in the lower court, no further comment will be made herein upon this point.

II.

THE LETTER FROM APPELLEE'S ATTORNEY TO ATTORNEY RAINES DID NOT OPERATE TO FULFILL THE TERMS OF THE POLICY WITH REGARD TO THE FORWARDING OF THE SUMMONS AND PROCESS.

The letter referred to is as follows:

> "Mr. Joseph M. Raines Jan. 10, 1927
> Attorney at Law
> Fairfield, California
> Dear Sir:
>
> I received a copy of your demurrer in the matter of Colthurst v. Harris.
>
> Subsequent to the commencement of the action in Solano County, I commenced an action in Napa County where the accident occurred and accordingly I have dismissed the Solano action and enclose you a copy of the same.
>
> Very truly yours,
> Harry I. Stafford."

Upon the trial of this action, counsel for appellee contended that the above letter operated to satisfy the condition of the policy requiring the forwarding of process to appellant. In their brief in the trial court, counsel for appellee cited no cases in support of their contention to that effect and indeed no case could be found which would support it. The requirement that process be forwarded to the insurance company as soon as served is one separate and distinct from the requirement of notice of any claim made against the assured. A claim may be made or an action commenced without prosecution thereof by the injured person and without service of complaint and summons thereunder. It is one thing for the insurance company to learn that a claim has been made or that an action has been commenced and it

is another thing of a great deal more consequence to learn that the complaint and summons have been served, necessitating an appearance in the action. The letter from appellee's counsel constituted advice or notice only of the commencement of the action and contains no reference to or notice of service of process, which is the vital thing.

III.

IN VIEW OF THE LAW AND OF THE PROVISIONS OF THE POLICY, THE RIGHTS OF THE APPELLEE ARE NO GREATER THAN THOSE OF THE ASSURED, AND THE FAILURE OF THE ASSURED TO NOTIFY APPELLANT OF THE SERVICE OF PROCESS UPON HIM PRECLUDES ANY LIABILITY UNDER THE POLICY IN FAVOR OF EITHER THE ASSURED OR APPELLEE.

It should first be borne in mind that in California the rights of an injured person against the insurance company are defined by the California Statute (Statutes of 1919, page 776), which provides that policies of insurance of the type involved in the case at bar must contain:

> "a provision that the insolvency or bankruptcy of the person insured shall not release the insurance carrier from the payment of damages for injuries sustained or loss occasioned during the life of such policy and stating that in case judgment shall be secured against the insured in an action brought by the injured person * * * then an action may be brought against the company, on the policy and subject to its terms and limitations, by such injured person * * * to recover on said judgment."

In the case of *Malmgren v. S. W. Ins. Co.,* 201 Cal. 29, it has been held that the above statute must be considered in law as a part of every insurance policy issued by an insurance company within the State of California and the rights of an injured person under a policy issued in the State of California are therefore to be determined by reference to the terms of the above statute rather than by reference to the terms contained in the policy itself if the terminology of the policy deviates from the statute. As will be hereinafter noted, there are some deviations between the terms of the policy in the case at bar and the provisions of the California statute but these deviations need not be here considered, for in view of the Malmgren decision, the question involved in the case at bar is to be determined as if the provision of the statute had been exactly reproduced in the terms of the policy.

The question of the rights within the State of California of an injured person against an insurance company where the assured has violated some material provision of the policy has recently been settled in this jurisdiction by the decision of this Honorable Court in the case of *Georgia Casualty Company v. Boyd* (No. 5708, Dec. filed July 29, 1929). In that case the insurance company issued to one Dr. Jarvis in California, a physician's liability insurance policy for $5000. In his application for the policy, Dr. Jarvis represented that no claim had been paid by him for damages on account of alleged error or mistake or malpractice on his part. After the issuance of the policy, one Miss Boyd obtained a judg-

ment against Jarvis in the amount of $5000, as damages for malpractice during the term of the policy. The judgment remained unsatisfied and Miss Boyd brought an action against the insurance company under the applicable statute of California above referred to. After the act had occurred which caused the injury to Miss Boyd, the insurance company had rescinded the policy which had been issued to Jarvis on the ground of a material misrepresentation of Jarvis contained in his application for the policy. Miss Boyd obtained a judgment from the insurance company in the United States District Court in the amount of the judgment which she had previously obtained against Jarvis. The insurance company appealed from the judgment against it and by the decision of this honorable court, the judgment of the United States District Court was reversed. The ground for the reversal is contained in the following excerpt from the opinion of the Court of Appeals:

> "The contention most vigorously urged for appellee is that though the rescission may have operated to cut off any right Dr. Jarvis would otherwise have had, as to her it was wholly ineffective for any purpose. Her reasoning is that under the California statute above quoted the policy is, in effect, a tri-party contract, that her right accrued upon the happening of her injury, and that nothing done thereafter without her consent could operate to divest her of that right. She cites Malmgren v. S. W. etc. Ins. Co., 201 Cal. 29; Pigg v. International Indemnity Co., 86 Cal. App. 671; Finkelberg v. Cont. Cas. Co., 219 Pac. 12; Metropolitan Cas. Co. v. Albritton, 282 S. W. 187; Slavens v. Standard Accident Co., 27 Fed. (2d) 859. But admittedly no decided case is directly in point, and hence we do not

stop to analyze or distinguish the citations. Appellee's position would be tenable in the case of a valid contract of insurance, *but it is quite incredible that the legislature, even were its power to be granted, intended to vest in a third person, who parted with no consideration, a right superior to that of the assured himself, or to give validity in favor of such third person to an instrument void as between the parties thereto.* It may be conceded that after an injury has been suffered, neither by agreement nor otherwise could the parties to the policy deprive the injured person of the benefit thereof, but as already suggested, the right of the third person presupposes the existence of a valid policy. *The manifest purpose of the statute is to give the injured person the same footing the insured would have, had the latter paid the judgment for damages. In the one case, as well as the other, the defense of invalidity is open to the insured."* (Italics ours.)

From the language of this honorable court in the above case of *Georgia Casualty Co. v. Boyd,* it is thus seen that the rights of an injured person against the insurance company are, under the California statute, no greater than those of the assured, this court having expressly stated that:

> *"The manifest purpose of the statute is to give the injured person the same footing the insured would have, had the latter paid the judgment for damages."* (Italics ours.)

An examination of the California statute reveals that this is the only possible interpretation which can be drawn from it. The statute could not be more explicit in indicating that the rights of the injured person are subject to all of the defenses which might be urged against the assured himself. The statute provides that—

> "In case judgment shall be secured against the insured in an action brought by the injured person * * * then an action may be brought against the company, *on the policy and subject to its terms and limitations,* by such injured person * * * to recover on said judgment."

What could the phrase "on the policy and subject to its terms and limitations" mean if it did not refer to the *conditions* of the policy? The policy of insurance is a contract between the assured and the insurance company. The contract contains certain terms, conditions and limitations. These terms, conditions and limitations include the amount of the premium, the amount of the policy, the period during which the policy is to remain in force, the limitations as to the risks insured against, conditions with regard to notice of claims, forwarding of process, cooperation by the assured, etc. There is nothing in the statute which indicates that by the use of the term "on the policy and subject to its terms and limitations" is meant only some of the terms, conditions and limitations and not others. If it were intended that by the use of the words in the statute "terms and limitations" the legislature meant anything less than *all* of the terms and limitations of of the policy, there would be no conceivable criterion for determining which of the terms and limitations were meant to be included and which to be excluded. Behind the explicit terms of the statute, definite and unequivocal as they are, appears very clearly the intention of the legislature. It is not compulsory in the State of California for the operator of an automobile to carry liability insurance. It is

plain that by the statute in question the legislature of California has provided that *if* the operator of an automobile carries liability insurance and *if* the policy is in full force and effect at the time any judgment is obtained against him by an injured person (namely if at that time the assured has fulfilled all of the terms of the policy with reference to representations, payment of premium, notice to the insurance company of any accident, etc.) the injured person shall then have a right of action against the insurance company to recover on such judgment. The injured person has paid no consideration for this right and it is not a right which exists independently of statute. It is indeed very questionable whether the legislature could constitutionally grant to an injured person a right of recovery against the insurance company independently of any right of recovery existing in the assured. Be that as it may, the legislature has attempted to grant no such right. It has simply provided that in case there is any liability whatsoever existing against the insurance company at the time the injured person has procured his judgment against the assured, then and in such event only the injured person may proceed against the insurance company. To hold that the insurance company is liable to the injured person in all cases in which it has issued a policy to an automobile owner, regardless of the terms and limitations of the policy and of any liability to the assured, would be so grossly unreasonable that even in the case of an ambiguous statute it would be necessary for the court, if possible, to adopt a construction which would avoid such

a consequence. In view of the explicit and unambiguous terms of the statute, however, the court is faced with no such task of construction. The statute is clear that the right of the injured person is dependent upon the fulfillment of the terms and limitations of the policy; and one of those terms or limitations is that there shall be no liability on the part of the insurance company in the event of the failure by the assured to promptly forward to the insurance company all process served upon him in relation to any claim coming within the risks insured against.

That this question is settled in this jurisdiction by the decision of the court in *Georgia Casualty Company v. Boyd* is obvious in view of the facts of the case and of the language of the court in its decision. In view of the contentions of counsel for appellee in the case at bar upon the trial thereof, it may be safely anticipated, however, that counsel will seek a reversal in the case at bar of the principle laid down by this court in *Georgia Casualty Company v. Boyd,* and inasmuch as appellant herein will have no opportunity to file a closing brief, the other decisions dealing with this question will here be reviewed.

A thorough examination of the authorities in this country dealing with the question of the rights of an injured person against an insurance company where the assured has violated some material provision of the policy has revealed that the prevailing doctrine is in accord with that laid down by this court in *Georgia Casualty Co. v. Boyd,* that is, that the in-

jured person stands in the same position as the assured, and that where the assured has forfeited his rights under the policy by reason of a violation of some material provision thereof, the injured person is likewise without remedy against the insurance company.

The leading cases dealing with this question and in which the prevailing doctrine has been adopted, are as follows:

Pigg v. International Ind. Co., 86 Cal. App. 671;

Bryson v. International Ind. Co., 55 Cal. App. Dec. 87;

Roth v. National Casualty Co., 195 N. Y. S. 865;

Schoenfeld v. N. J. etc. Ins. Co., 197 N. Y. S. 608;

Miller v. Union Indemnity Co., 204 N. Y. S. 730;

Coleman v. New Amsterdam Co., 213 N. Y. S. 532;

Schroeder v. Columbia Cas. Co., 213 N. Y. S. 649;

Hermance v. Globe Co., 223 N. Y. S. 93;

U. S. Casualty Co. v. Breese (Ohio), 153 N. E. 206.

Two of the cases above cited are decisions of the District Court of Appeal of the State of California. An examination of these two cases plainly reveals that the rule in California is that the injured person stands in the shoes of the assured in reference to a right of action against the insurance company.

Pigg v. International Ind. Co., 86 Cal. App. 671:

This was an action brought against an insurance company by an injured person to recover a balance due on judgment procured against the assured. The insurance company set up as a defense that the assured failed to cooperate with it in that he left the country before the trial of the action against him. The lower court found this defense to be untrue,—apparently upon the theory that the assured, a foreigner, was not sufficiently advised by the insurer that his presence would be needed at the trial. The Appellate Court, after a detailed discussion of the facts in reference to the trial court's finding, decided that the finding was supported by the evidence. From the fact that the finding was considered upon its merits the inference may be drawn that the defense of the assured's failure to cooperate may be raised, in California, by the insurer against the injured person.

Bryson v. International Ind. Co., 55 Cal. App. Dec. 87:

This was an action brought against the insurer by the holder of a judgment against the insolvent assured. The insurer set up as a defense that at the time of the accident the plaintiff was being transported by the assured for an implied consideration and that therefore the injury was not one covered by the policy. The court said:

> "Had the insured paid the amount of the judgment it would have been conclusive in his favor against the company on every issue properly

tried in the action against him, he having notified the company of the action and requested it to defend the same. (Civ. Code, Sec. 2778, subdiv. 5.) Since the policy provides for an action on such a judgment by the injured person against the company, under the circumstances stated, *the evident intent is that such person shall have the rights which the insolvent insured would have had if he had paid the judgment.* Such a judgment is conclusive only in respect to the matters adjudged. No one would contend that it precludes the company from defending on the ground that it did not issue the alleged policy or that the policy issued by it does not cover the motor vehicle which caused the injury. It seems equally clear that the company may show in defense that its policy does not indemnify against liability for damage to persons of the class to which the injured person belongs. In other words, before the company can be held liable as an indemnitor it must be proved that it is an indemnitor. 'While one who is required to protect another from liability is bound by the result of the litigation to which such other is a party, provided the former had notice of such litigation, and an opportunity to control its proceedings, a judgment against a party indemnified is conclusive in a suit against his indemnitor only as to the facts thereby established. The estoppel created by the first judgment cannot be extended beyond the issues necessarily determined by it.' (14 R. C. L. 62; 31 C. J. 461; Pezel v. Yerex, 56 Cal. App. 304, 309.) (Italics ours.)

The remainder of the authorities above cited are decisions of the courts of New York and of Ohio. Reference to a few of these cases will reveal that the holding in those states is the same as that indicated by the California cases above considered.

Roth v. National Casualty Co., 195 N. Y. S. 865:

This was an action brought by an injured person against an insurance company under an automobile liability policy. In compliance with Section 109 of the Insurance Law of New York the policy contained a provision which is identical with the one in the policy of appellant in regard to the injured person's right of action against the insurer, namely, that in case of insolvency of the assured such action may be brought by the injured person "under the terms of the policy." There was question in this case whether the assured failed to cooperate with the insurance company after the accident. *As incidental to that question the query arose whether such a defense is available to the insurance company in an action brought by the injured person.* The latter query was gone into very thoroughly by the court and the court held that the phrase "under the terms of the policy" gave the insurance company in an action brought against it by the injured person all the defenses which it might have urged against the assured. The main opinion was written by Justice Greenbaum and concurred in by Justice Dowling. Justice Greenbaum said in part:

> "The sole issue was whether the assured failed to cooperate with the company, and whether such failure was a non-compliance with one of the terms of the policy, which would have barred a recovery by him against the company, and hence would be a bar to a recovery by the plaintiff in this action.
>
> (1) The question thus arises: What is the meaning of the words 'under the terms of the

> policy,' in the clause above quoted? The respondent contends that they refer only to 'the risks insured against by the terms of the policy, and when according to the terms of the policy it was in force at the time of the accident.' The appellant insists that they refer to every term of the policy which is obligatory upon the policy holder, and which, if the assured violated, would bar recovery by him, and hence by the injured person suing under the policy. It seems to us that the Legislature did not intend to deprive the insurance company of any defenses which it could have properly urged against the assured under the provisions of the policy, had he brought an action thereon." (pages 866-867.)

The evidence as to lack of cooperation was then considered and the court held that there was no such lack of cooperation as would constitute a breach of the policy; the judgment against the insurance company was therefore affirmed. A dissenting opinion was written by Justice Laughlin and concurred in by Presiding Justice Clarke, the opinion of the dissenting Justices being that there was sufficient evidence to establish the fact of a material lack of cooperation by the assured. The dissenting opinion, however, approved the construction placed upon the statute with regard to the injured person's right of action against the insurance company, the opinion stating:

> "As I view the statute, the Legislature intended, in such case, to give a cause of action to the person injured or the personal representative of the decedent against the insurance company *on the policy,* provided the assured could have recovered thereon for any liability enforced against him and covered by the policy."

It is true that Justice Smith, who concurred in the *judgment* of the court, took a contrary view of the *statute.* He said:

> "I concur in the result. I do not think that the failure of the insured to cooperate after the accident, not induced by plaintiff, constitutes a defense. To hold otherwise puts the plaintiff at the mercy of the owner, who is presumptively hostile. This was not intended by the statute."

The construction adopted by Justice Smith, however, is overcome by the united opinion of the other four Justices, as set forth above with regard to this matter.

The majority opinion in the *Roth* case, as above indicated, has been followed in all the subsequent New York decisions on this matter.

Schoenfeld v. New Jersey Etc. Ins. Co., 197 N. Y. S. 608:

This was another case of failure of the assured to cooperate with the insurer after an automobile accident. The action was brought by the injured person against the assured, judgment had and execution returned unsatisfied. Thereatfer suit was brought by the injured person against the insurance company who set up the defense of the assured's failure to cooperate. The New York court again considered Section 109 of the Insurance Law and the corresponding provision in the policy and held that the defense of failure to cooperate was available to the insurer. This case contains another thorough discussion of the point, at the conclusion of which the court said:

> "*I can see nothing in the statute showing a legislative intent to deprive the company of this defense, or to create any other or different liability to the injured party than that which the policy gave to the assured.* On the contrary, the intention was that, at the time when a right of action accrued to the injured party under the provision of Section 109 of the Insurance Law (Consol. Laws, c. 28), to justify a recovery from the company upon the judgment, the policy *must then be in force.* It is clear from the language of that section that the liability of the company to the injured party does not accrue until an execution issued upon the judgment obtained against the assured has been returned unsatisfied by reason of insolvency or bankruptcy. Insolvency or bankruptcy is the test upon which the right of action depends, and the time when that insolvency or bankruptcy is to be determined is when the execution is returned unsatisfied. If, prior to that time, therefore, the assured had violated the terms and conditions of the policy in such manner as to entitle the company to cancel it, pursuant to its provisions, no right of action would survive to the injured party." (Italics ours.)

It should be noted (and the fact was pointed out by appellee at the trial of the case at bar) that the California statute differs from the New York statute in this: The New York law requires the policy to contain a provision that the insolvency or bankruptcy of the assured shall not release the insurance carrier from the payment of damages for injuries sustained or loss occasioned during the life of the policy and that *in case execution against the assured is returned unsatisfied* because of such insolvency or bankruptcy in an action brought by the injured person then an action may be maintained by the injured person against the insur-

ance company under the terms of the policy for the amount of the judgment in the said action not exceeding the amount of the policy.

The California statute on the other hand does not require that an execution shall have been returned unsatisfied. The California statute *does* require, however, that a judgment shall have been secured by the injured person against the assured as a prerequisite to the maintenance of an action against the insurance company. The policy issued by the appellant in this case is obviously drawn in conformity with the New York, rather than with the California statute. The policy of appellant provides as follows (Tr. p. 68):

> "(5) THE INSOLVENCY OR BANKRUPTCY of the Assured hereunder shall not release the Company from the payment of damages for injuries sustained or loss occasioned during the life of this policy, and in case execution against the Assured is returned unsatisfied because of such insolvency or bankruptcy in an action brought by the injured or his or her personal representative in case death results from the accident, then an action may be maintained by the injured person or his or her personal representative against the Company under the terms of the policy for the amount of the judgment in the said action, not exceeding the amount of the policy."

It is conceded, of course, that the policy in this case must conform to the California law and that the rights of the appellee hereunder are to be determined in view of the California, rather than the New York statute. The distinction between the two statutes is, however, insignificant and immaterial with regard to the point here being raised; for, granting that it is not neces-

sary in California that an execution be returned unsatisfied, nevertheless it *is* necessary that a *judgment shall have been procured* against the assured before an action may be maintained against the insurance company. At the trial appellee contended that the liability of the insurance company to the injured person accrues in final and conclusive form at the time of the accident or injury, and that nothing which the assured may do after that time can affect that liability. The error of that contention appears very plainly from an inspection of the California statute which provides that a judgment must have been procured against the assured before an action may be brought against the insurance company. The *Schoenfeld* case above cited remains therefore an authority on this question despite the difference between the two statutes. The *Schoenfeld* case holds that the liability of the insurance company to the injured person does not accrue until the execution has been returned unsatisfied and that to justify a recovery from the company upon the judgment the policy *must be in force* at that time. Applying that authority to the situation arising under the California law, the principle may be stated as follows: That the liability of the insurance company to the injured person does not accrue until a *judgment has been obtained* and that to justify a recovery on such judgment the policy must have been in force at the time the judgment was obtained. In citing the New York authorities we are not, therefore, relying on the narrower New York statute.

There is another distinction between the New York and the California statutes. By virtue of this dis-

tinction the California statute is of the two the more favorable to the insurance company. The New York statute provides that an action may be brought "under the terms of the policy." The language of the California statute in this respect is "on the policy and *subject to its terms and limitations.*" In other words, the California statute, in considering the rights of the injured person, is explicit in its reference to the limitations of the policy with regard to liability thereunder.

Hermance v. Globe Idemnity Co., 223 N. Y. S. 93, 97:

In this case the court, in adhering to the above rule. said:

> "The owner of an automobile is not required to procure liability insurance. When he does so it is for his own protection. The rights which an injured party has under the statute against the company are no greater than those which the assured possesses. Such is the logical reasoning of the cases above cited."

U. S. Casualty Co. v. Breese (Ohio), 153 N. E. 206:

This was an action brought against the insurer by an injured person who had previously procured a judgment against the assured, on which an execution had been returned unsatisfied. The policy contained the same provision as in the above cases, namely, that the injured person might maintain an action against the insurer "under the terms of the policy." The court held that failure of the assured to notify the insurer of service of process upon him constituted a good defense to the action brought by the injured.

Commenting upon the phrase "under the terms of the policy," the court said:

> "It will thus be seen that the city ordinance explicitly makes the right of recovery dependent upon the terms of the policy of insurance held by the operator of the motor bus. * * * From the fact that the injured party, Martha Breese, has no rights in this case except such as arise under the policy, construed in connection with the legislation authorizing it, the conclusion necessarily follows that she has no greater rights against the insurance company than were held by Joe Zurawski, the assured. * * *."

From the above authorities, it is clear, therefore, that this principle that the injured person has no greater rights than the assured has been adopted by this Circuit of the United States Court of Appeals, by the Courts of California, New York and Ohio. It is our contention that the doctrine is not only the only one which can be drawn from a reading of the statute, but that it has also been settled by the above precedents. Upon the trial of this case, however, counsel for appellee relied upon a few decisions which contain language apparently conflicting with the holding in the cases above cited. Inasmuch as it may be anticipated that counsel for appellee will rely upon the same decision upon this appeal, we will briefly review the same. The decisions are as follows:

Malmgren v. Southwestern Automobile Ins. Co., 201 Cal. 29;

Marple v. American Automobile Ins. Co., 82 Cal. App. 137;

Kruger v. California Highway Indemnity Exchange, 201 Cal. 672;

Finkelberg v. Continental Cas. Co., 126 Wash. 543, 219 Pac. 12;

Metropolitan Cas. Ins. Co. v. Albritton (Ky.), 282 S. W. 187;

Slavens v. Standard Acc. Ins. Co., 27 Fed. (2d) 859.

An examination of these cases will reveal that in each of them either there was no conflict with the doctrine above referred to or the facts differentiated the case from the case at bar in so far as the principle here in question is concerned. The cases will be taken up in the above order.

Malmgren v. Southwestern Automobile Ins. Co., 201 Cal. 29:

A great deal of stress was laid upon the above case by counsel for appellee at the trial of the case at bar, but the effect of the decision is frankly conceded by appellant herein, namely, that the California statute in reference to policies of this kind is considered in law a part of the policy and that the requirements of the statute may not be deviated from by any insurance company operating in California. The appellant in the case at bar is an insurance company whose Home Office is located in New York State and whose business is conducted throughout the nation. It has obviously drawn its policy in conformity with the law in New York State. As a result of the Malmgren decision and of the sound doctrine recited therein, the policy of the appellant herein must conform to the California law with regard to insurance written by it in this state and where the policy deviates from the requirements of the California law, it must be read

and construed as if the California law had been expressly incorporated therein. As hereinabove pointed out, however, the deviation between the policy in the case at bar and the California statute with regard to the necessity of the injured person's having procured an unsatisfied execution under the judgment against the assured is immaterial to the present inquiry and does not in any way affect or reduce the weight of the authority of the New York decisions dealing with this question.

Counsel for appellee in the case at bar are the same attorneys who acted as counsel for appellee in the case of *Georgia Casualty Company v. Boyd.* In the trial of the case at bar, they made the same contention as that asserted by them in resisting the appeal of Georgia Casualty Company in the case of *Georgia Casualty Company v. Boyd,* namely that there is language in the Malmgren decision to the effect that such an insurance policy is a tri-party contract, the three parties being the insurance company, the assured and the injured person; that the necessary consequence of this language is that the right of action against the insurance company accrues to the third party, the injured person, at the time of the injury. This does not follow. The original insurance policy may be a tri-party contract, but the rights of the third party and any cause of action which may exist in favor of such third party depend upon several conditions and limitations, namely, those contained in the policy of insurance. Even apart from the matter of the forwarding of all process by the assured, there is the limitation or condition embodied both in the

statute and in the policy that the injured person must have procured a judgment against the assured before he can bring an action against the insurance company. It is evident therefore that the liability of the insurance company to the injured person, although it may have its inception in the accident or incurring of the injury, does not accrue as a legal right of action against the insurance company until the procuring of the judgment against the assured.

Marple v. American Automobile Ins. Co., 82 Cal. App. 137:

This case merely holds that in an action by an injured person against the insurance company the plaintiff is not required to allege and prove the insolvency of the insured. The reason for this holding is that the statute is conjunctive; that is, it requires the policy to contain "a provision that insolvency * * * shall not release * * * *and* stating that in case judgment shall be secured * * * then an action may be brought * * *." As a matter of fact this case illustrates the point which we have hereinabove made, namely, that the right of action of the injured person against the insurance company depends upon and arises out of the *judgment* which such injured person has procured against the assured. As already indicated, the liability of the defendant herein had become extinguished by the time the judgment was procured by the appellee herein.

Kruger v. California Highway Ind. Exchange, 201 Cal. 672:

This was an action brought by an injured person against an insurance company upon a liability policy

issued to a jitney bus driver. The plaintiff had procured a default judgment against the driver, upon which execution had been returned unsatisfied. The insurance company defended upon the ground that the assured had failed to notify it of the action brought against him. The court held that the defense was not a good one and that the policy created a primary liability in favor of the injured person. The case is, however, plainly distinguishable from the case at bar in that by the policy in the *Kruger* case the insurer guaranteed directly to the injured person the payment of any judgment which such injured person might procure against the assured. The provision in the policy is as follows: "It is hereby understood and agreed that in the event a final judgment covering any loss or claim under this policy is rendered against the subscriber the agent guarantees the payment of said judgment direct to the plaintiff securing said judgment, irrespective of any financial responsibility on the part of the subscriber." It is obvious that by the above provision there was intended to be created a liability in favor of the injured person independent of the relations between the insurer and the assured. No such intention can be inferred from the wording of the policy of appellant. Another fact distinguishing the *Kruger* case from the case at bar is that the policy in the *Kruger* case was required by law to be secured by all persons driving jitney busses in the city of San Francisco before they could procure a license to operate said busses. The law governing this matter was an ordinance of the City and County of San Francisco known as the "Jitney Bus Ordi-

nance." The ordinance required that "said policy shall guarantee payment of any final judgment rendered against the said owner or leases of said jitney bus *irrespective of the financial responsibility or any act or omission* of said jitney bus owner or lessee." (Italics ours.)

In commenting on this language the Supreme Court said:

> "It would be difficult to frame language more simple or direct than this language. It can have but one meaning, and that is that appellant guaranteed the payment to the party securing the same of any judgment rendered against Delaney and covering any loss or claim under said policy. * * * Appellant's liability was to pay the judgment, and in a contract of that character the promisor is bound by the judgment whether he have notice of the action or not, even though he is not a party thereto. * * * 'There can be no doubt that where a surety undertakes for the principal, that the principal shall do a specific act, to be ascertained in a given way, as that he will pay a judgment, that the judgment is conclusive against the surety; for the obligation is express that the principal will do this thing, and the judgment is conclusive of the fact and extent of the obligation. As the surety in such cases stipulates without regard to notice to him of the proceedings to obtain the judgment, his liability is, of course, independent of any such fact'."

Owing to the provision in the policy and of the ordinance above referred to it is plain that the liability of the insurance company in the above case amounted to a pure guarantee of payment of the judgment and therefore, of course, the court was obliged to hold that once the judgment had been pro-

cured the insurance company was bound to pay the same regardless of any question of the merits or of notice to the insurance company from the assured. The ordinance was designed, of course, to protect the general public against reckless and unskillful driving. To accomplish this purpose it was necessary to impose a liability upon the insurance company, which liability would exist without reference to any conditions or limitations in the policy other than the amount thereof. On the other hand, the assured in the case at bar was not required to purchase liability insurance. In respect of the assured in this case the law simply provides that if an insurance company does grant him insurance and a judgment is procured against him by an injured person, an action may be maintained by such injured person against the insurance company *"on the policy and subject to its terms and limitations."* The law in this case does not impose upon the insurance company the relation of *guarantor* but simply provides that an action may be maintained subject to the terms and limitations of the policy. The distinction between the relation of guarantor under the Jitney Bus Ordinance and that of an ordinary indemnity policy such as that written by the insurance company in this case is a vital one in so far as the question in this case is concerned, and the decision in the *Kruger* case is, therefore, in no way decisive of the case at bar.

Finkelberg v. Continental Cas. Co., 126 Wash. 543; 219 Pac. 12:

This was an action brought by an injured person against the insurer, the plaintiff having first procured

a judgment against the assured, and an execution having been returned unsatisfied. The policy contained the customary provisions regarding the duty of the assured to forward all process, and stipulating that in case of insolvency of the assured the injured person might maintain an action against the insurer under the terms of the policy. The insurer defended upon the ground that the insured had failed to notify it of the pendency of the action against him; also on the ground that two days before that action was commenced a written agreement had been entered into between the insurer and the assured cancelling the policy. By the terms of the written agreement, the assured, for consideration of $850, released the insurer from all liability under the policy and particularly with reference to the accident to the plaintiff. In the injured's action against the insurer the court held that the plaintiff's demurrer to the answer should have been sustained. The court stated:

> "It is the contention of respondent that it should not be forced to pay the judgment of appellant, for the reason that it had not been notified of the pendency of the action according to the terms of the policy providing for notice to be given to respondent. The policy did not provide for the appellant to give notice to respondent. By the settlement with respondent, Tanaka was not required to give notice, and if he were so required and failed to give notice this would not in any wise affect the rights of appellant. He could neither destroy the rights of appellant by his agreement with respondent nor by his neglect to give notice to respondent."

There are several factors distinguishing the above case from the case at bar.

In the first place the policy in the *Finkelberg* case provided that no action could be brought against the insurer unless the loss should have been fixed by a final judgment against the assured in a court of last resort. The policy then provided:

> "The company shall be bound, however, as to such final judgment, not exceeding the limits of the policy, to pay and satisfy such judgment and to protect the assured against the levy of any execution issued upon the same."

Just as in *Kruger v. California Highway Ind. Exchange,* supra, the court obviously construed this provision as creating a liability in favor of the injured person, independent of the insurer's obligation to the assured. There is no such provision in the policy of appellant.

In the second place the policy in the *Finkelberg* suit contained a provision permitting the injured person who had procured a judgment and an unsatisfied execution against the assured to maintain an action against the insurance company "under the terms of the policy." The provision in the California law with regard to this cause in the policy is as hereinabove pointed out more explicitly framed with a view to render available to the insurance company the defense of any breach of the conditions of the policy, the California law reciting that the action may be brought *"on the policy and subject to its terms and limitations."*

In the third place there was obvious collusion between Tanaka, the assured, and the insurance company in the *Finkelberg* case, for after the accident occurred Tanaka and the insurance company entered

into an agreement attempting to cancel the policy, the agreement explicitly referring to any liability arising out of the accident to the injured person involved in that suit. The merits of the case, therefore, were strongly against the insurance company and in view of those merits it is not at all surprising that the court should have taken the position it did.

Metropolitan Cas. Ins. Co. v. Albritton (Ky.), 282 S. W. 187:

This was an action brought against the insurance company by injured persons who had previously procured a judgment against the assured on which an execution had been returned unsatisfied. The insurance company set up the defense that the assured failed to cooperate. The lower court sustained a demurrer to the paragraph of the answer in which the above defense was set up. This ruling was sustained by the upper court, which said:

> "The excerpt above, taken from the policy, conferring a right of action upon the injured person against the company (defendant), in case of insolvency or bankruptcy of assured, was a stipulation for the exclusive benefit of such injured person, and it thereby created, under the policy, a dual obligation to the company in the event of the conditions named—one to the damaged person because of the accident growing out of either personal injuries or property lost, and the other to the assured—and those obligations, when they arose under the policy, were totally independent of each other. Neither the assured by anything he might do could defeat plaintiff's cause of action under that clause, and likewise nothing they might do could defeat his right of action when it accrued by his paying the judgments against him."

An examination of the opinion in the above case indicates that the language above quoted was merely dictum. The suits in which the judgments were procured against the assured were tried on their merits, the defense being actively conducted by the insurance company and there was no showing that the defense was in any way prejudiced or weakened by the assured's alleged failure to cooperate. The court therefore said immediately following the language above quoted:

> "Besides, it is doubtful if the results would be different if we construed the policy to unify in every particular the rights of the damaged person and those of the assured, without a showing that the failure to render the stipulated assistance resulted in judgments against him. No such pretense is made in the case, either by pleading or proof, nor is it attempted to be shown that any fact material to the defense of the suits against Mimms was omitted or undeveloped on those trials. But, be those facts as they may, there can be no doubt about the correctness of our interpretation of the policy, and the court did not err in its ruling in sustaining the demurrer to the second paragraph of the answer as pleaded."

The decision in the case was plainly dictated by the merits. The insurance company had actively defended the actions brought against the assured. It would therefore have been estopped to raise the point of failure of the assured to cooperate. Besides, as indicated by the opinion, there was no showing of prejudice to it by reason of the alleged failure to cooperate. The plaintiff in that case was, therefore, entitled to a judgment against the insurance company on undisputed and well established principles of law, and

there was no necessity for the court to attempt to lay down a rule which was in conflict wtih the overwhelming weight of authority on this matter.

Slavens v. Standard Acc. Ins. Co., 27 Fed. (2d) 859:

In the above case the complaint alleged that a policy of automobile insurance was issued to one Ernst, the policy covering any person or persons riding in or legally operating said automobile; that the plaintiff in the case was injured while riding in the automobile with one Weinsheimer who was then operating the automobile with the consent of the owner, Ernst; that plaintiff brought an action against Weinsheimer for plaintiff's injuries; that immediately thereafter plaintiff gave written notice of the action to the insurance company and delivered to both the insurance company and to Ernst copies of the summons and complaint; that both the insurance company and Ernst neglected to defend the action; that before commencing the action the plaintiff had delivered to both the insurance company and to Ernst a notice containing fullest information concerning the accident and of plaintiff's claim; that immediately after the occurrence of the accident Ernst had also given to the insurance company a written notice of the accident and of plaintiff's claim; also, that immediately after the commencement of the action Ernst gave to the insurance company a copy of the summons and complaint; that plaintiff recovered a judgment against Weinsheimer; that thereafter the plaintiff caused execution to be issued and gave notice thereof to the

insurance company; and that execution was returned unsatisfied.

The insurance company demurred to the complaint on the ground, among others, that Weinsheimer failed to give the insurance company the requisite notice as required by the policy. In other words, the insurance company had received from both the injured person and the owner of the automobile all the notice to which it was entitled (notice of the claim, of the action, of service of process, and of the judgment), but it endeavored to make a point of the fact that notice had not come from the proper party, namely, from Weinsheimer, who was one of the persons insured and the person against whom the claim was being made.

The court first considers whether the policy was one of indemnity against *actual loss* or against *liability for loss,* and held that it was one against liability for loss. The court then says:

> "The question arises whether Weinsheimer's failure to give the defendant notice of the accident immediately after its occurrence, with the fullest information obtainable, and full particulars of any claim made against him on account thereof, is fatal to the right of the plaintiff herein to recover on a complaint which alleges that all the prescribed information so stipulated for was promptly furnished by both the plaintiff and by Ernst. In fire and life insurance it is generally held that a stipulation in the policy as to the person by whom notice is to be given is of the essence of the contract. (Citing cases.) But exceptions are recognized in cases where notice and proofs of loss are made by 'the real party in interest,' although he is not the named assured, but his rights are such that he is held to be the assured within the meaning of the policy, as in

Watertown Ins. Co. v. G. & B. S. M. Co., 41 Mich. 131, 1 N. W. 961, 32 Am. St. Rep. 146; Milwaukee Mechanics' Ins. Co. v. Brown, 3 Kan. App. 225, 44 P. 35; and Alezumas v. Granite State Fire Ins. Co., 111 Me. 171, 88 A. 413.

"We think that the plaintiff herein is a beneficiary of the insurance policy and a real party in interest, and that his compliance with the condition of the policy as to prompt notice and information was sufficient to authorize him to bring the present action, and that he could not be deprived of his rights under the policy by Weinsheimer's neglect or failure to act. The policy recognizes the plaintiff's right to sue upon the policy in providing that 'the insolvency or bankruptcy of the assured shall not release the company from the payment of damages for injuries sustained or loss occasioned during the policy period. In the event of the assured being unable to satisfy judgment against him, the injured person, or his heirs or personal representatives, in case of death resulting from an accident, shall have the right of action against the company, subject to the terms and limitations of this policy, to recover the amount of said judgment.' Ordinarily the beneficiaries of an indemnity contract may maintain an action on the contract, though not named therein, when it appears by fair and reasonable intendment that their rights and interests were in the contemplation of the parties, and were being provided for at the time of making the contract. (Citing cases.)"

After referring to the cases of *Finkelberg v. Continental Casualty Co.* and *Metropolitan Cas. Ins. Co. v. Albritton,* the court then states:

"The case at bar is not a case of entire absence of notice to the insurer, as in Travelers' Insurance Co. v. Myers & Co., 62 Ohio St. 529, 57 N. E. 458, 49 L. R. A. 760, and other cases cited by the defendant, in which it was held that the stipula-

> tion as to notice was of the essence of the contract. Here the plaintiff, as well as Ernst, who paid the premium for the insurance, furnished the defendant all the information that could have been given it by Weinsheimer, and no ground is seen for holding the notice and information insufficient, or that Weinsheimer's inaction affected substantial rights of the defendant."

It is obvious therefore that the decision in the *Slavens* case was based upon the fact that the insurance company received all the notice to which it was entitled and that its contention that the notice had not come from the proper person was hypertechnical and a mere quibble.

CONCLUSION.

This completes a review of all of the authorities on this question which a thorough examination of the decisions in this country has disclosed. Appellant respectfully contends that the review of these authorities reveals:

1. That the question has been settled in this court by the decision of this court in the case of *Georgia Casualty Company v. Boyd.*

2. That even if it should be conceded that the holding in the *Finkelberg* case and in the other cases relied upon by appellee is in conflict with the doctrine adopted by this court in *Georgia Casualty Company v. Boyd,* the prevailing doctrine is that adopted in *Georgia Casualty Company v. Boyd* and in the decisions hereinabove considered of the courts of California, New York and Ohio.

3. That none of the cases relied upon by counsel for appellee at the trial hereof is in point with the case at bar and that each of them is plainly differentiated from the case at bar in reference to the point here under consideration.

4. That the prevailing doctrine represents the only reasonable construction of the statute for, as stated by this court in the case of *Georgia Casualty Company v. Boyd*,—

> "it is quite incredible that the legislature, even were its power to be granted, intended to vest in a third person, who parted with no consideration, a right superior to that of the assured himself, or to give validity in favor of such third person to an instrument void as between the parties thereto * * *. The manifest purpose of the statute is to give the injured person the same footing the insured would have, had the latter paid the judgment for damages."

It is respectfully submitted, therefore, that the judgment should be reversed.

Dated, San Francisco,
October 14, 1929.

Respectfully submitted,
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H. R. McKinnon,
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